Supreme Court, U.S.
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No. 02-1677

IN THE

Supreme Court of the United States

VOLKSWAGEN OF AMERICA, INC., *et al.*,

Petitioners,

v.

NATHANIEL TRULL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

It is respectfully submitted that, based on the established facts, the controlling law and the procedural history of this case, further appellate review by this Honorable Court is not warranted. An experienced and distinguished district court judge, Joseph A. DiClerico, presided at the trial and ruled on the post-trial motions. A seasoned and eminent panel of the First Circuit Court of Appeals heard Volkswagen's appeal. These courts concluded that Volkswagen failed to protect the record in this case on multiple occasions, thus waiving the position it now argues. These rulings were based not only on established First Circuit principles which have been settled for decades, but also on a universally accepted construction of Rule 51 of the Federal Rules of Civil Procedure. Moreover, both the district judge and the First Circuit concluded that Volkswagen had asserted disingenuous arguments and had misstated the record. That approach has continued in Volkswagen's Petition for Writ of Certiorari.

This product liability case arising out of an incident in which one child was killed and another child was brain injured was tried twice in the United States District Court for the District of New Hampshire. The case was originally filed in January 1994 and first went to trial in May 1998 before Judge DiClerico. In that first trial, the jury returned a verdict for Volkswagen. The Trulls appealed, contending that the district court erred in its instructions to the jury as to who bears the burden of proof in a crashworthiness case relating to enhancement of injuries. The First Circuit Court of Appeals certified that issue to the New Hampshire Supreme Court. *Trull v. Volkswagen of America, Inc.*, 187 F.3d 88 (1st Cir. 1999). The Supreme Court of New Hampshire agreed with plaintiffs' position, and reiterated the concept that under New Hampshire law, it is appropriate in a

product liability case to submit both the theories of negligence and strict liability to the jury. *Trull v. Volkswagen of America, Inc.*, 761 A.2d 477 (N.H. 2000). The First Circuit then remanded the matter to the district court for a new trial. *Trull v. Volkswagen of America, Inc.*, 229 F.3d 343 (1st Cir. 2000).

The second trial began in April 2001, again before Judge DiClerico. The plaintiffs claimed that the 1986 Volkswagen Vanagon was negligently designed and tested and was defective in that rear seat passengers were provided with lap only belts despite the fact that rear shoulder harnesses were standard equipment in the Vanagon sold in Europe, in other Volkswagen vehicles sold in this country and could have easily been incorporated into the Vanagon sold in the United States. The case was submitted to the jury on the eleventh day of trial.

Volkswagen requested a jury instruction indicating the Trulls could win the case by prevailing on *either* their strict liability *or* their negligence claim. Volkswagen's request read, in pertinent part:

> Plaintiffs have brought this case under two theories of liability: (a) strict liability in tort; and (b) negligence; You may return a verdict for plaintiffs on either one or both of these theories. App., *infra*, 1a-2a.

In accordance with Volkswagen's request and pursuant to the agreement of the parties, the trial court instructed the jury six times that the Trulls could recover on either the basis of strict liability or negligence and that they need only prove one of these claims in order to recover (VW App., 37a-46a). Volkswagen did not object. The parties agreed to a special verdict form which specifically instructed the jury to decide the negligence claim even if it answered "No" on the strict liability claim (VW App., 34a-

36a). Volkswagen did not object. The jury returned a verdict finding "Yes" on negligence and "No" on strict liability and awarded damages. Volkswagen did not object or claim that the verdict was inconsistent prior to the discharge of the jury. After the jury was discharged, Volkswagen's counsel congratulated the Trulls' counsel. Judgment was entered for the Trulls on April 25, 2001.

On May 7, 2001, Volkswagen filed its post-trial motions for judgment as a matter of law or, in the alternative, for a new trial and for remittitur. In these motions it argued for the first time that the verdict was inconsistent. On June 6, 2001, the district court entered an order denying defendant's motions, concluding that defendant's claims of inconsistent verdict "are not only without merit but also they have not been raised in a timely fashion." (VW App., 19a-29a). The district court further found that Volkswagen "appears to be trying to manufacture confusion ex post facto where in fact none existed".

Volkswagen appealed to the First Circuit Court of Appeals. During oral argument, under careful questioning by Judge Lipez, Volkswagen admitted that it was not relying on the "plain error" exception to Rule 51, Fed. R. Civ. P. On November 14, 2002, the First Circuit affirmed the judgment below in all respects, *Trull v. Volkswagen of America, Inc.*, 320 F.3d 1 (1st Cir. 2002) (VW App., 1a-18a). The court concluded that:

1. Volkswagen had forfeited its objection to any verdict inconsistency by failing to object at any time prior to the jury's discharge;

2. Volkswagen had waived any objection to verdict inconsistency by failing to object to the instructions to the jury pursuant to Rule 51, Fed. R. Civ. P.;

3. It was not plain error under New Hampshire law to enter judgment for the Trulls on negligence, but not on strict liability;

4. There was a "plethora of evidence" supporting the jury's finding that Volkswagen was negligent.

Volkswagen filed a petition for rehearing which was denied on February 11, 2003. On February 27, 2003, the First Circuit denied Volkswagen's motion to stay the mandate and mandate was issued immediately. On March 7, 2003, Volkswagen applied to this Court for a stay of the mandate. Justice Souter denied the application on March 11, 2003. Shortly thereafter, Volkswagen paid the judgment.

REASONS FOR DENYING THE PETITION

I. Introduction

The way in which Volkswagen describes the proceedings below is completely inaccurate. Volkswagen also misstates the issues which would be before the Court if the writ were granted.

Volkswagen acquiesced through all phases of the trial with the concept that the Trulls could recover in negligence even if the jury found no strict liability. Volkswagen even requested a jury instruction to that effect. The following chronology details Volkswagen's consent to the proposition that the Trulls could recover in negligence even if the jury found no strict liability.

1. Volkswagen requested an instruction which explained that the case was brought under the theories of strict liability and negligence and that, "You may return a verdict for plaintiffs on either one or both of these theories". (App., *infra*, 1a-2a).

2. Volkswagen failed to object to a "Yes" on negligence/"No" on strict liability verdict, either at the charging conference or after the final draft of instructions was prepared. (VW App., 27a).

3. Volkswagen explained in its closing argument to the jury that if they answered no to the question of defect, they did not get to the issue of causation with respect to strict liability. Volkswagen then went on to discuss the questions relating to negligence. (App., *infra*, 3a).

4. Volkswagen failed to object to the Trulls' closing argument, in which plaintiffs explained the two alternative theories of recovery to the jury and advised the jury that the Trulls could recover under either theory. (App., *infra*, 4a-6a).

5. Volkswagen failed to object to the court's instruction that, "The plaintiffs have asserted strict product liability and negligence claims against the defendant. However, they need not prove both claims to recover. They will be entitled to recover if they prove one or the other of these claims." (VW App., 37a-38a).

6. Volkswagen failed to object to the court's instruction that, "A plaintiff need not prove both claims in order to recover. It is sufficient if a plaintiff proves one or the other of the claims". (VW App., 44a).

7. Volkswagen failed to object to the court's instruction that, "If the plaintiff fails to meet his burden on both claims, you will conclude your

deliberations. If the plaintiff meets his burden on one or both of his claims then you will take up the next issue. . . ." (VW App., 45a).

8. Volkswagen failed to object to the directions after Question 1 on the Special Verdict Forms, which advised the jury to go to the question of negligence if they answered "No" to strict liability, and the court's corresponding explanation that, "If you answer no to question number one . . . you've made a determination that under the theory of strict liability, the plaintiff did not meet his burden of proof . . . If you come to that conclusion . . . you would go over and take up the negligence claim." (VW App., 34a; App., *infra*, 8a).

9. Volkswagen failed to object to the directions after Question 4 on the Special Verdict Forms, which advised the jury to proceed to crashworthiness damages issues, if they answered "Yes" to either strict liability and/or negligence, and to the court's corresponding instruction that, "there are two claims here, strict liability and negligence. All the plaintiff needs to do in order to recover damages is to prevail on one of those claims. The plaintiff need not prove both of those claims. If the plaintiff proves one of those claims, the plaintiff would be entitled to damages." (VW App., 35a; App., *infra*, 9a).

10. Volkswagen failed to object to the court's instruction that "all the plaintiff needs to do is to prevail on one of the claims in order to pass on the damage issue." (App., *infra*, 9a).

In the face of this record, Volkswagen seeks to avoid the inexorable conclusion that it invited the error which it now alleges by discussing purported differences in the way the circuit courts have handled issues relating to Rule 49. But if certiorari were granted in this case, this Court would never reach those issues. This case would be resolved on the same issue as that upon which it was resolved in the lower courts — waiver. That is regardless whether the verdict is characterized as one submitted or returned under Rule 49(a) or Rule 49(b), no court would overlook Volkswagen's continued acquiescence with the concept that the plaintiffs could win in negligence while losing in strict liability. While Volkswagen claims that most courts would reach the merits of its argument, nothing could be further from the truth. In fact, no other court would reach the merits of defendant's argument and Volkswagen cites no case to alter this conclusion.

From the moment Volkswagen filed its post-trial motions, it has adopted a strategy of diversion and obfuscation. Disregarding the fact that Volkswagen's counsel congratulated plaintiffs' counsel after the verdict, Volkswagen argued in the district court that the verdict slip should be construed to mean that Volkswagen won the case. Desperately trying to convince the district court that the jury somehow failed to follow the court's instructions, Volkswagen claimed the jury must have been confused. The district judge, however, recognized the transparency of Volkswagen's tactics by stating that, "the defendant appears to be trying to manufacture confusion ex post facto where in fact none existed." (VW App., 24a).

Volkswagen's bankrupt strategy continued in the First Circuit. Rejecting the contention that the district court somehow did not afford Volkswagen an adequate opportunity to object to the verdict, the First Circuit found "nothing in the record to substantiate this implication" (VW App., 3a). Although

Volkswagen claimed that it had been thwarted in its attempt to lodge objections to the verdict, the First Circuit rejected Volkswagen's claim, stating, "there is nothing in the record to indicate that VW wished to object to anything" (VW App., 4a). Judge Campbell, concurring, simply concluded that "[i]f VW wanted to argue the inconsistency issue, it needed to preserve its rights". (VW App., 18a).

The attempts to misstate and divert attention continue in this Court. Volkswagen states on numerous occasions in its Petition that it should not be faulted for failing to object to submission of both negligence and strict liability theories because submission of both theories is specifically warranted under state law. But whether both theories were appropriately submitted is not and has never been the issue on which the case has turned. The issue has always been and continues to be whether Volkswagen waived its inconsistency argument on the merits by continually failing to argue that a verdict for defendants on strict liability would preclude a verdict for plaintiffs on negligence. As to this, the true issue, Volkswagen continually advocated for and adopted the position directly contrary to that which it now asserts. Under the doctrine of invited error, a principle universally followed in all of the circuits, Volkswagen may not be heard on the merits of its argument.

II. The Case Was Correctly Decided Below

A. Volkswagen's Failure To Comply With Fed. R. Civ. P. 51 Precludes Consideration Of The Issues It Raises Pursuant To Fed. R. Civ. P. 49

An examination of the record below indicates that Volkswagen did not preserve any objection which would now allow it to argue before this Court that the verdict is inconsistent. Volkswagen had every opportunity to assert the position that a finding of no strict liability would result in judgment in its favor. Instead, it agreed with and adopted the position that the Trulls could recover on their negligence claim even if the jury found for Volkswagen on the strict liability claim. Thus, in accordance with the special verdict form, the trial court instructed the jury:

> Now, as you can see from the questions and from the instructions under question number one there, if you answer[1] question number one, you go on to question number two. *If you answer no to question number one, then you don't go on to question number two* because you've made a determination that under the theory of strict liability, the plaintiff did not meet his burden of proof. *If you come to that conclusion, then you would not go on to question two. You would go over and take up the negligence claim.*

(App., *infra*, 8a) (emphasis added). Volkswagen specifically agreed to and failed to object to this instruction.

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1. It appears that the court reporter omitted the words "yes to" from the transcript at this location.

Volkswagen tiptoes through its problem of not having objected to the verdict form and corresponding instructions by admitting that it "might have been preferable" if the form instructed the jury to end its deliberations after a "No" finding on question 1 (VW's Petition at 28).[2] Yes, it "might have been preferable" for Volkswagen to have made the necessary objection to preserve its argument for appeal rather than to waive it. No, Rule 51 cannot be read to excuse Volkswagen's failure to object.

As Judge DiClerico pointed out in his opinion denying Volkswagen's post-trial motions, Volkswagen had numerous opportunities to object to the concept that plaintiffs could win in negligence while losing in strict liability, but failed to do so. The court summarized the proceedings as follows:

> This case has been through two trials. If the issue of inconsistent verdicts is as significant as the defendant contends, then it is one the defendants should have anticipated and should have raised with the court earlier in the proceedings when there were numerous opportunities to do so. However, it was not raised during the charging conferences for either trial, by way of objection immediately after the jury charge was given in either trial, or by way of objection immediately following the jury's verdict in the second trial. It was in the second trial that the issue was raised for the first time in a motion filed a number of days after the verdicts were returned and the jury had been discharged.

(VW App., 21a).

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2. *See Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10 (1st Cir. 2001), where the same district court judge gave such an instruction, which the court found appropriate under the circumstances of that case, where it was requested by the defendant.

The First Circuit affirmed the decision of the district court in all respects. Concerning Volkswagen's Rule 51 waiver, the First Circuit stated:

> The instructions made it clear that the jury was to be asked to decide the issue of liability on both the theory of strict liability and the theory of negligence. The verdict forms had been examined by counsel for VW before they were submitted. VW's reason for its failure to object at the critical times was that the verdicts did not become inconsistent until after the jury had completed them. But we cannot accept this; to do so would countenance agreeable acquiescence to perceivable error as a weapon of appellate advocacy. By failing to timely object to the jury instructions, VW thereby waived any objection it may have had. *See* Fed. R.Civ. P. 51

(VW App., 6a) (citations and internal quotations omitted).

Groping for an argument that there is something controversial about its garden-variety waiver, Volkswagen claims there is a conflict among the circuits concerning the manner in which Rule 51 should be interpreted. The best Volkswagen can do to manufacture this conflict is to cite *Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88 (3d Cir. 1993) and *Holloway v. McIntyre*, 1988 WL 7961 (6th Cir.). These cases most certainly do not support the contention that a party need not comply with Rule 51 to preserve an issue for appeal. Moreover, to the extent these cases might be read to excuse non-compliance with Rule 51, they are aberrations rather than evidence of a conflict.

Loughman involved an incredibly complex proceeding in which the jury was requested to answer at least 59 interrogatories.[3] In analyzing the specific nature of that verdict form, the Third Circuit indicated that it was focusing on whether the jury's answers could be reconciled rather than whether the parties failed to object under Rule 51. The court ultimately concluded that the verdict could be harmonized based on the jury's answers to the questions submitted. *Loughman* provides no support that there is a conflict between the circuits concerning Rule 51.

Nor does the *Holloway* case provide support for Volkswagen's argument. There, the jury failed to follow the court's instructions which indicated that the employer could only be liable based on the acts of its employees. Under the verdict returned by the jury, the employer was held liable and the employees exonerated. Because the court concluded that the jury must have been confused, the Sixth Circuit upheld the district court's order vacating the judgment against the employer. Here, in contrast, as both the district court and the First Circuit recognized, the jury simply adopted one of the choices agreed to by Volkswagen: finding for the plaintiff on negligence and for the defendant on strict liability. Again, *Holloway* certainly does not indicate there is a conflict in the circuits concerning Rule 51.[4]

There is no hint in the record of this case that Volkswagen should be excused from failing to comply with Rule 51. This

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3. The verdict form is not set out in the opinion, but the court referred to the jury's response to interrogatory 59.

4. As to Volkswagen's claim that the "view" of the Third Circuit is "reflected implicitly" in other decisions (VW's Petition at 25), there is no indication whatsoever than a waiver issue under Rule 51 was in any way involved in those decisions.

Court will ordinarily not decide questions not raised in the lower courts, particularly where the party seeking to argue the issue has failed to object to a jury instruction pursuant to Fed. R. Civ. P. 51. *City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, *reh. denied*, 481 U.S. 10311 (1987). Because Volkswagen's failure to comply with Rule 51 dooms any chance of success on the merits and renders moot any Rule 49-related issues, Volkswagen is unable to establish that there is any conflict between the circuits, the resolution of which would allow it to prevail on the merits. The writ should be denied.

B. No Construction Of Rule 49 Would Serve To Preserve Volkswagen's Contention That The Verdict Is Inconsistent

As is made clear by the foregoing discussion, Volkswagen did not contend that the verdict was inconsistent until days after the jury was discharged. There was good reason for this; the verdict was in fact consistent with the way the case was tried. That is, the parties agreed throughout the trial that the Trulls could recover in either negligence or strict liability. When the jury found for the Trulls on one of these theories, it was simply accepting one of the options it had been given under the instructions and the verdict form.

A reversal of the judgment in this case would sanction the unthinkable. It would allow a litigant to consistently advocate for and agree with a proposition of law or procedure throughout the trial (i.e., that the Trulls could win in negligence while losing on strict liability) and then allow the litigant to renounce that position, assume the opposing position and seek a new trial after the jury is discharged. Needless to say, allowing litigants to do that would engender chaos in the justice system. Cases would be routinely tried on multiple occasions, until the losing litigant achieved a

result to his satisfaction. In the words of the First Circuit, "to countenance a setting aside of the verdicts in this case would place a premium on agreeable acquiescence to perceivable error as a weapon of appellate advocacy." *Merchant v. Ruhle*, 740 F.2d 86, 92 (1st Cir. 1984).

Every single Circuit Court of Appeals recognizes the doctrine of invited error. That is, where a party itself proposes a jury instruction accepted by the court and later attacks that instruction on appeal, review will be denied under the doctrine of invited error. *United States v. Taylor*, 2003 WL 1459140 (9th Cir.); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 868 (2003); *United States v. Celestine*, 2002 WL 1821971 (4th Cir.), *cert. denied*, 123 S. Ct. 706 (2002); *Parker v. Champion*, 148 F.3d 1219 (10th Cir. 1998); *United States v. Baybank (Houston), Inc.*, 934 F.2d 599 (5th Cir. 1991); *Harris v. Roadway Express, Inc.*, 923 F.2d 59 (6th Cir. 1991); *United States v. Muskovsky*, 863 F.2d 1319 (7th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989); *United States v. Young*, 745 F.2d 733 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Weiner v. Roll Form, Inc.*, 744 F.2d 797 (Fed. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *United States v. Kakley*, 741 F.2d 1 (1st Cir.), *cert. denied*, 469 U.S. 887 (1984); *Mid-America Food Service, Inc. v. ARA Services, Inc.*, 578 F.2d 691 (8th Cir. 1978); *United States v. Wiggins*, 530 F.2d 1018 (D.C. Cir. 1976); *Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767 (3d Cir. 1975).

In the case at bar, it is obvious why Volkswagen did not object prior to jury discharge. Put simply, the verdict of the jury was consistent, not inconsistent, with the instructions that had been given. While some of the points in Volkswagen's petition as to conflicts in Rule 49 decisions might be germane to some

other case, they have no relation to this one, where the verdict delivered by the jury was completely consistent with the legal principles stated in the charge.[5] The jury was properly instructed on what the Supreme Court of New Hampshire has referred to as the "semantical and theoretical differences" between the "apples" of negligence and the "oranges" of strict liability. *Thibault v. Sears Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843, 849 (1978). In accordance with this principle, the jury was given three choices: to find for the Trulls on both theories, to find for Volkswagen on both theories, or to find for each of the parties on one of the theories. The jury had three choices and accepted one of them. Any conflicts which exist between the circuits as to the various aspects of Rule 49 cannot negate the simple fact that the jury verdict here was not inconsistent with the law and choices agreed to by the parties.

Thus, Volkswagen's lengthy discourse as to the fine distinctions between Rule 49(a) and Rule 49(b) is of no moment here. Needless to say, Volkswagen cites no case under either Rule 49(a) or 49(b) where a litigant prevailed on appeal after requesting a jury instruction adopted by the court and then claiming that an inconsistent verdict resulted from the court's acceptance of the instruction. The courts have rejected this type of argument through the use of various terms — waiver, judicial estoppel, invited error, law of the case — but have never sanctioned it. To do so would result in a mockery of the justice system.

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5. Volkswagen complains that the verdict cannot stand because the jury did not find a "defect". That term, however, in context, is often used as a shorthand way of referring to the requirement of "unreasonably dangerous defective condition" and/or negligent conduct. For example, in the decision of the Supreme Court of New Hampshire in this case, the court in one instance uses the term "design defect" and in another instance uses the term "defendant's conduct" in referencing the showing plaintiff must make to shift the burden of proof on injury causation to the defendant. *Trull v. Volkswagen of America, Inc.*, 145 N.H. 259, 761 A.2d 477, 482, 483 (2000).

While it is certainly true that this Court has on occasion granted certiorari to address conflicts in the Circuits as to interpretation of procedural rules,[6] this Court should not grant certiorari in a case where the merits of any such conflict would

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6. If this Court had wished to address issues relating to Rules 49(a) and (b), it had a much better opportunity to do so in *Jarvis v. Ford Motor Co.*, 283 F.3d 33 (2d Cir.), *cert. denied*, 123 S. Ct. 539 (2002), in which Ford raised a virtually identical argument to that which Volkswagen urges here. This case has remarkable similarities to the *Jarvis* case in which this Court denied certiorari on November 12, 2002. Both cases are automotive product liability cases in which virtually identical verdict forms were utilized. In each of the cases the jury found for the plaintiff on negligence but for the defendant on strict liability. In each case, the plaintiff claimed that the defendant had failed to preserve its objection to the allegedly inconsistent verdict. In *Jarvis* the Second Circuit agreed, finding for the plaintiff in a two-to-one decision. Because of the extreme similarity of the *Jarvis* case to the case at bar, Volkswagen here had no choice but to argue that *Jarvis* was an "erroneous decision" in seeking rehearing in the First Circuit. This Court denied Ford's Petition for Writ of Certiorari in *Jarvis* despite the fact that *Jarvis* presented a much stronger record for the manufacturer than that in this case. Specifically, the *Jarvis* record involved the following:

- Ford argued before the case was submitted to the jury that the case should not be submitted on both strict liability and negligence. Volkswagen made no such contention here.

- Ford objected to the alleged inconsistency of the verdict before the jury was discharged. Volkswagen made no such objection here.

- The trial court specifically instructed the jury that "if . . . you find the product was not defective . . . you will find that Ford was not negligent". The jury was not so instructed here.

never be reached. The case at bar involves a pedestrian attempt by a litigant to play fast and loose with the federal court system by attempting to change its position after failing to protect the record and losing at trial. No Circuit Court of Appeals would come to the aid of such a litigant; this Honorable Court should certainly not do so.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS OF DEFENDANTS' REQUEST FOR JURY INSTRUCTIONS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Civil Action No. 94-15-JD

ELIZABETH TRULL, NATHANIEL TRULL
PPA DAVID TRULL, DAVID TRULL INDIVIDUALLY
AND DAVID TRULL, ADMINISTRATOR OF THE
ESTATE OF BENJAMIN TRULL,

Plaintiffs

v.

VOLKSWAGEN OF AMERICA, INC.
and VOLKSWAGEN, A.G.,

Defendants

DEFENDANTS' REQUEST FOR JURY INSTRUCTIONS

Proposed Instruction No. 1

You are instructed to return a verdict in favor of the defendants, Volkswagen of America, Inc. and Volkswagen, A.G.

* * *

Appendix A

Proposed Instruction No. 8

Alternative Theories.

Plaintiffs have brought this case under two theories of liability: (a) strict liability in tort; and (b) negligence; You may return a verdict for plaintiffs on either one or both of these theories.

Plaintiffs' strict liability theory arises from the allegation that the defendants manufactured and sold a vehicle that contained defects which rendered the vehicle defective and unreasonably dangerous as well as a claim that defendants failed to warn Mr. and Mrs. Trull and their family about these claimed defects.

Plaintiffs have also alleged that defendants are liable under a theory of negligence. Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a (reasonably careful) person or corporation would use under the same or similar circumstances. This is the standard of care that all persons are expected to live up to. Negligence may consist of either doing something that a (reasonably careful) person would not do under the same or similar circumstances or failing to do something that a (reasonably careful) person would do under the same or similar circumstances. Failure to exercise due care amounts to legal fault if you find it caused or contributed to cause the injury or damage suffered by the plaintiffs.

N.H. Civil Jury Instructions, No. 6.1

* * * *

APPENDIX B — EXCERPTS OF VOLKSWAGEN'S CLOSING ARGUMENT

[Commencing R. 2407]

* * *

Now, you are going to be given a verdict form by the Court and that verdict form is going to have a number of questions on it. One of those questions is going to be was the Volkswagen 1986 [2408] Vanagon defective and unreasonably dangerous. The Court will give you more instruction on that, but if you answer no to that question, then you don't go any further. You don't get to issues of causation with respect to the strict liability.

There's going to be another question involving negligence. Was the design and manufacture and sale of the Volkswagen — was Volkswagen negligent in doing that. If you answer no to that question, you go no further.

I submit to you, ladies and gentlemen, that when you go to the jury room and evaluate the evidence, you can reach only one conclusion, a no answer to both of those questions.

Thank you very much.

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APPENDIX C — EXCERPTS OF TRULLS' CLOSING ARGUMENT

[Commencing R. 2440]

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Ladies and gentlemen, what we have in this case are two claims. One is strict liability and one is negligence, and we haven't talked much about this, so let me just explain this to you, and the judge will explain it in detail.

There are two theories under the law. One says, strict liability, that if a manufacturer makes a product that's defective or unreasonably dangerous without looking at the manufacturer's conduct, and if that defect or unreasonably dangerous product causes an injury, that's it. I've proven my case.

The other one, negligence, looks at the [2441] conduct, the attitude, the testing, the designing of the product, the conduct of the defendant which is called negligence; and those are the two theories.

Now, here's what I want you to remember. Under strict liability — and listen to Judge. DiClerico and see if he says this — if the manufacturer did not take reasonable steps to lessen or eliminate the danger, you can find them liable for strict liability.

Well, ask yourself how could Volkswagen have lessened or eliminated the danger of these defective unreasonably unsafe lap/shoulder belts? Very simple. You put in lap/shoulder belts. That's all they had to, do.

Appendix C

Under the theory of negligence a manufacturer's required to design and sell a vehicle without any reasonable dangers. The failure to do what a reasonable and prudent manufacturer should do is enough for you to find that they are liable. Well, what do you think a reasonably prudent manufacturer should have done? I'm showing you right here. Here's our American companies. They do it. They tell the people. They at least advise the people of the availability of those lap/shoulder belts, not Volkswagen. They don't put them in and they don't [2442] even tell you about them. And if the unreasonable danger can be eliminated or reduced without excessive cost, that you can use to find them negligent with.

Well, what was the added cost to Volkswagen to put in these lap/shoulder belts if they are already doing it on the same production line for Germany? Zero, doesn't cost them anything. According to Mr. Meissner, they charge the customer.

There's another issue you are going to be looking at. It's called proximate causation, and I apologize for throwing all of this at you, but you are going to have to deal with it, so I want you to be somewhat familiar with it. A fancy word, proximate causation. What it means is that if you find that Volkswagen was strictly liable or negligent, you have to say to yourself was their conduct, was that strict liability or negligence, a legal cause of the injuries to these boys?

Appendix C

Now, keep in mind I don't have to prove to you that their negligence or strict liability was the only cause or the sole cause. I don't have to prove that to you. Listen to the judge. I only have to prove to you that that strict liability or negligence was a proximate cause, was a substantial contributing factor to the injury.

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APPENDIX D — EXCERPTS OF JURY INSTRUCTIONS

[Commencing R. 2489]

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Now, attached to your instructions are copies of the special verdict forms. There is one form for Nathaniel — for the plaintiff, Nathaniel Trull, and one form for the plaintiff, Benjamin Trull, and we have put the names in bold type so that you do not confuse the two since the formal title of the cases is very similar.

As I said, a special verdict form for each of the plaintiffs because you are to consider each claim separately. The foreperson will have an original special verdict form and will be responsible for filling out that form. This form follows the order in which I gave you the instructions. So in a way it provides an order for your deliberations.

As I said there are two claims here. One is under the theory of strict liability and one is under the legal theory negligence. You will first take up the strict liability claim and you will address the [2490] first question, which says, do you find by a preponderance of the evidence that the 1986 Vanagon was defectively designed because it lacked lap/shoulder belts in the rear seating positions? You will answer that question yes or no. If you answer that question yes, then you have a second question to answer under the strict liability claim, and that is the causation question. Do you find from a preponderance of the evidence that the defective condition caused or substantially caused injuries to Nathaniel Trull over

and above those which were probably caused as a result of the original collision? You will answer that question yes or no.

Now, as you can see from the questions and from the instructions under question number one there, if you answer question number one, you go on to question number two. If you answer no to question number one, then you don't go on to question number two because you've made a determination that under the theory of strict liability, the plaintiff did not meet his burden of proof. If you come to that conclusion, then you would not go on to question two. You would go over and take up the negligence claim.

The negligence claim, question three, asks you the following question. Do you find by a [2491] preponderance of the evidence that the defendant was negligent in designing and/or testing the 1986 Vanagon because it lacked lap/shoulder belts in the rear seating positions? You will answer that question yes or no. Again, if you answer that question yes, then you will go on to question four, which is the causation question. Did the defendant's negligence cause or contribute to cause the injuries to Nathaniel Trull over and above those which were probably caused as a result of the original collision? However, if you answer question three no, that means that you have found that the defendant was not negligent or that the plaintiff did not meet his burden in that case; so there's no need to go on and answer question four.

At that point, depending on what you have done, you address the instructions at the bottom of the page that say further instructions.

Now, as I said, there are two claims here, strict liability and negligence. All the plaintiff needs to do in order to recover damages is to prevail on one of those claims. The plaintiff need not prove both of those claims. If the plaintiff proves one of those claims, the plaintiff would be entitled to damages. Obviously if the plaintiff proved both of those claims, the plaintiff would be entitled to [2492] damages. If the plaintiff doesn't prove either one of those claims, the plaintiff is not entitled to damages.

So that is what these further instructions reflect. If you have answered yes to questions one and two, that would be yes on strict liability, and yes to questions three and four, then you would go on to answer more questions. Let me do the "or" part of it now, if you have answered yes to question one and two or question three and four.

Once again, that's another way of saying that all the plaintiff needs to do is to prevail on one of the claims in order to pass on the damage issue.

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